It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control."

The Lord Justice concluded his judgment by saying that:

"There are, however, many cases in the books where *certiorari* was used to correct errors of law on the face of the record. A striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where *certiorari* was used to determine the validity of a sewer's rate imposed by the commissioners of sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books."

Morris L.J., another member of the court, agreed "that an order of *certiorari* will go to the respondent tribunal does not admit of doubt." At page 356 the Lord Justice said:

"The speeches in the House of Lords in *Walsall Overseers* v. *London and North Western Railway Co., supra,* demonstrated that if that which was stated upon the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by *certiorari* and its existence could be ended by quashing it."

I am satisfied that there was an error of law on the face of the record because the facts which were fully stated on the record were plainly inconsistent in law with the decision reached. I therefore quash the order of the commissioner and restore the order of the collector.

*Order accordingly.*

Solicitors: *Wilson & Co.; Dato' Bijaya & Co.*

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## PUBLIC PROSECUTOR v. SUNDARAVELU

**[A.Cr.J. (Raja Azlan Shah J.) August 25, 1966]**

**[K.L. — Criminal Application No. 10 of 1966]**

*Criminal Law and Procedure — Appeal — Application to file petition of appeal out of time — Discretion — Substantial justice.*

*Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. s. 6 — Possession of a knife — Lawful purpose — Criminal Procedure Code (Cap. 6), s. 310.*

The respondent had been charged with possession of an offensive weapon in a public place otherwise than for a lawful purpose under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance. The learned magistrate acquitted the respondent without calling him for his defence on the ground that the knife was an ordinary kitchen knife, that the prosecution had not proved the absence of a lawful purpose and that no dangerous situation existed at the time of the arrest and there was therefore reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. Notice of appeal had been filed by the public prosecutor but there was a delay in filing the petition of appeal as the petition was sent to the officer-in-charge of police district Kuala Selangor instead of to the court. The public prosecutor applied for leave to file the petition out of time.

**Held:** (1) this was a proper case in which the court would exercise its discretion and allow the application so that substantial justice may be done;

(2) in view of its size and shape the knife in this case was undoubtedly a lethal weapon and by virtue of subsection (2) of section 6 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, it was for the defence to negative any unlawful purpose;

(3) in this case the acquittal must be set aside and an order made that the magistrate should call on the respondent for his defence.

*Cases referred to:—*

(1) *Veerasingam* v. *Public Prosecutor* [1958] M.L.J. 76.

(2) *Abdul Manap* v. *Public Prosecutor* [1952] M.L.J. 140.

CRIMINAL APPLICATION.

*Ajaib Singh* (Deputy Public Prosecutor) for the appellant.

*Lall Singh Muker* for the respondent.

**Raja Azlan Shah J.** (delivering oral judgment): This is an application by the deputy public prosecutor by way of motion to file the petition of appeal out of time. The circumstances leading to this application are as follows:

The respondent was charged in the magistrate's court at Kuala Selangor with an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The case eventually came before the learned magistrate at Kuala Selangor. He heard evidence for the prosecution and at the end of the case he acquitted and discharged the respondent without calling for the defence. On March 29, 1966 a notice of appeal was filed by the deputy public prosecutor against that decision, and I may say that the notice was filed in good time. On June 27, 1966 the notes of evidence and grounds of judgment of the learned magistrate were received by the learned deputy public prosecutor, and on July 5, 1966 the learned deputy posted his petition of appeal to the Officer in Charge of Police District, Kuala Selangor. The latter delivered it to the magistrate's court on July 9, 1966, i.e. a slight delay of two days.

This application brings into review the provisions of section 310 of the Criminal Procedure Code (Cap. 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind emphasis is laid on the phrase "in order that substantial justice may be done in the matter." I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam's* case.[1] There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it

ceases to be a discretion and becomes a rule of law. The definition of substantial justice has been stated by the learned Chief Justice in the following words:

"Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed."

It is unfortunate that the learned deputy public prosecutor posted the petition to the Officer in Charge of Police District instead of direct to the magistrate's court at Kuala Selangor. Bearing in mind the words of the learned Chief Justice (above), I am satisfied that this is a proper case in which to exercise my discretion, and I will allow the application.

Counsel for the respondent urged me to treat the application as an appeal. I have complied with counsel's request; I have considered the notes of evidence and judgment of the learned magistrate. It transpired that the prosecution called two witnesses, the first was a police corporal. He testified that on February 6, 1966 at about 10.45 p.m., while on his rounds at Batang Berjuntai town, he saw four male Indians talking among themselves on the five-foot way of a cinema. The respondent was one of them. Then the corporal observed the respondent taking out a knife and holding it waist-high. The corporal demonstrated to the learned magistrate how that was done. The corporal went up to the respondent, arrested him, and dispossessed him of the knife. He was then taken to the police station. The other prosecution witness was the O.C.S. Batang Berjuntai Police Station, who received the report of the corporal and placed the respondent in custody. On those facts the respondent was charged "with possession of an offensive weapon in a public place otherwise than for a lawful purpose" under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The learned magistrate acquitted him without his defence being called; he based his decision on three grounds. Firstly, he was of the view that the knife was an ordinary kitchen knife obtainable in most shops selling kitchen-ware and consequently was not an offensive weapon. I disagree with him. In view of its size and shape the knife was undoubtedly a lethal weapon and, if so minded as a weapon of offence was likely to cause hurt. Secondly, the learned magistrate was of the view that the presumption under subsection (2) of the section should not be invoked in order to supplement a *lacuna* in the prosecution case on the ground that the case was not fully investigated. In my opinion the learned magistrate took a wrong view of the law. What the prosecution had to prove was to establish a *prima facie* case in the sense of adducing evidence that the respondent was in possession of an offensive weapon in a public place. It is not essential for the prosecution to prove the absence of lawful purpose. The onus of negativing the averment was for the defence to prove that he had a lawful purpose to possess the knife. Lawful purpose must here be used in the sense of purpose supported by law and to avail as a defence must relate to the actual time the weapon was found in the respondent's possession. An analogy can be drawn from the many decisions under the Emergency Regulations, 1951, notably the Court of Appeal case of *Abdul Manap* v. *Public Prosecutor*.[2] Thirdly, the learned magistrate took the view that no dangerous situation existed at the time of the arrest and therefore came to the conclusion that there was reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. That, to my mind, was a finding of fact based on speculation since the respondent had not given evidence to explain his purpose for possessing the knife.

I am therefore of the view that on the evidence as it stands a *prima facie* case has been adduced and by virtue of sub-section (2) it is for the defence to negative any unlawful purpose. The learned magistrate was clearly in error. I therefore revise his decision and make an order that he should call for the defence.

*Order accordingly.*

Solicitors: *Lovelace & Hastings.*

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## LEONG QUAKE HIN v. LEE KOR FAN

[A.C.J. (Gill J.) August 25, 1966]

[K.L. — Civil Appeal No. 20 of 1966]

*Mining — Cancellation of sub-lease — Technical difficulties — Mining Enactment (Cap. 147), ss. 16(iii) (b) and 82.*

This was an appeal against the decision of the senior inspector of mines rejecting the appellants' claim for cancellation of a mining sub-lease. The claim for cancellation was based on the ground that the respondent was in breach of the sub-lease as he had not during a period of six months employed sufficient labourers or labour saving appliances on the land and that the land was only used for tailing retentions while mining an adjacent land. The respondent did not deny the truth of the complaints but stated that he had not worked the land as it was mostly hilly and could not be mined independently.

**Held:** (1) although the senior inspector of mines had a discretion as regards cancellation of the sub-lease this discretion has to be exercised judicially on cause shown by the person complained against;

(2) technical difficulties about mining the land did not amount to a sufficient cause for non-cancellation of a sub-lease and in the present case there was no reason why the respondent could not have started mining operations on the land subleased to him before mining his own adjoining land;

(3) the appeal must therefore be allowed and an order made for the sub-lease to be cancelled.

*Case referred to:—*

(1) *Muthiah* v. *Lee Kor Fan* [1966] 1 M.L.J. 105.